

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

385.0812

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination Under the)
Sales and Use Tax Law of:)
)
THE T--- P---, INC.)
)
)
Petitioner)

DECISION AND RECOMMENDATION

No. SR AS 11-630637-010

The Appeals conference in the above-referenced matter was held by H. L. Cohen on September 9, 19XX in Van Nuys, California.

Appearing for Petitioner:

Appearance Waived

Appearing for the
Sales and Use Tax Department:

Mr. H. Murray
Supervising Tax Auditor

Ms. T. Pistoni
Tax Auditor

Protested Items

The protested tax liability for the period April 1, 1988 through March 31, 1991 is measured by:

<u>Items</u>	<u>State, Local and County</u>
A. Claimed exempt sales under \$10,000 Disallowed based on a sample	\$273,544
B. Claimed exempt sales over \$10,000 Disallowed on an actual basis	<u>364,010</u>
Total	\$637,554

Contentions

Petitioner contends that:

1. The publication "The Guide" is an exempt periodical sale of which is not taxable.
2. Sales of printed matter are exempt because the printed matter constitutes printed sales messages.

Summary

Petitioner is a corporation which is engaged in printing. The last Board audit was for the period through September 30, 1974.

The auditor examined petitioner's records of sales claimed to be exempt. Sales of a publication entitled "The Guide" to T--- M--- were claimed by petitioner to be sales of exempt periodicals. The auditor concluded that the publication contained primarily advertising material and thus did not qualify as an exempt periodical.

T--- M--- is a --- broker which sells tickets to various performances and events. "The Guide" contains a schedule of events and also advertisements. Two versions are published, one is for paid subscribers, and the other is given away free at music stores. "The Guide" is printed on both sides of a single sheet of paper. It is folded into twelfths with each of 24 panels having the appearance and format of a single complete page. The auditor regarded only one of the 24 panels as not being advertising. Petitioner contends that the schedules which form a major part of the publication are not advertising.

The auditor also disallowed exemption claims of printed matter claimed to be sales of printed sales messages. Petitioner contends that the sales to T--- M--- also qualify for this exemption. The auditor disallowed the exemption on the basis that petitioner delivered the printed products directly to the purchasers rather than to a mailer or distributor.

Analysis and Conclusions

Section 6362 of the Revenue and Taxation Code exempts from tax the sale and use of any periodical regularly issued at average intervals not exceeding three months. Sales and Use Tax Regulation 1590 provides that the term "periodical" does not include a publication of which the advertising portion including product publicity exceeds 90% of the printed area of the entire issue. At issue here is whether or not the schedule of events in "The Guide" constitutes advertising. There is apparently no question that the classification of the schedule information will determine whether or not the advertising exceeds 90% of the total area. We have previously concluded that where information is provided about a product but the primary purpose of providing the information is to create interest for the purpose of the sale of the product, the

information is regarded as advertising (see Business Taxes Law Guide Annotation 385.1580, December 19, 1966). Here the schedules are intended to induce recipients of "The Guide" to purchase tickets from T--- M---. Accordingly, the scheduled information is regarded as advertising. The publication, therefore, does not qualify as an exempt periodical.

Section 6379.5 provides:

"There are exempted from the taxes imposed by this part the gross receipts from the sale of, and the storage, use, or other consumption in this state of catalogs, letters, circulars, brochures, and pamphlets consisting substantially of printed sales messages for goods and services printed to the special order of the purchaser and mailed or delivered by the seller, the seller's agent, or a mailing house, acting as the agent for the purchaser, through the United States Postal Service or by common carrier to any other person at no cost to that person who becomes the owner thereof."

While we agree that the printed matter in question is the type of printed sales messages specified in the statute it is necessary for the printed sales message be delivered to a person other than the buyer. The essential element of the exemption is that the printed sales message does not come into the possession of the purchaser or the purchaser's employees. In many circumstances under Sales and Use Tax Law delivery to the agent of the buyer is regarded the same as delivery to the buyer. This exemption, however, specifically distinguishes between delivery to an agent of the buyer who was hired to distribute the printed sales messages and delivered to the buyer or an employee of the buyer.

It is not clear from the evidence available to whom petitioner delivered the printed sales messages. If delivery was to the buyer, the exemption does not apply. If delivery was to an independent person who was in the business of delivering advertising, the sales are exempt even if the person was hired by the buyer.

Recommendation

Reaudit to remove from the amount subject to tax sales in which delivery was made to an independent distributor or mailing agent.

H. L. Cohen, Senior Staff Counsel

Date